St. John's Law Review

Volume 75, Summer 2001, Number 3 | Article 3

Global Markets, National Law, and the Regulation of Business: A View From the Top

Eleanor M. Fox

GLOBAL MARKETS, NATIONAL LAW, AND THE REGULATION OF BUSINESS: A VIEW FROM THE TOP

ELEANOR M. FOX†

INTRODUCTION

Economic liberalization and technological innovations are changing the dimensions of markets. Both phenomena drive increasing economic integration in the world, making national borders irrelevant to global commerce.

As a result, market problems that were once national are now of international dimension. Many of the problems cannot be solved by a national-only, or nation-to-nation, horizontal view of the world. The global patterns of business and market competition call for a new paradigm for the regulation of business, one sufficiently copious to view the world as a market.[1]

Questions of larger-than-national economic governance have long been treated in the area of trade, particularly in the World Trade Organization and its predecessor the GATT. As we enter the new century, similar questions loom with regard to investment, the environment, labor, intellectual property, and the conduct and structure of business. Proposed solutions range from international codes and international economic law, to pro-active networking of nations and continued pursuit of unilateral national policies in the interests of the regulating nation.[2]

---

† Walter J. Derenberg Professor of Trade Regulation, New York University School of Law.

1 *See* Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1781 (2000) (recognizing arguments in favor of international antitrust on a higher level than that of any nation); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L. L. 478, 478–79 (2000) (requiring policies with global scope with the advent of international competition); *see also* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L. L. 7, 16–20 (1997) (discussing and surveying various antitrust options all of which are based on the assumption that the world is a market).

2 *See* Spencer Weber Waller, *An International Common Law of Antitrust*, 34

In this paper I will argue that economic reality is diminishing the utility and challenging the wisdom and justice of the supremacy of the nation-to-nation model. Through the window of regulating business conduct and structure, I outline the problems posed by unbending adherence to the national model, present case examples that demonstrate the limits of national-based solutions, and propose methodologies for achieving a broader vision.

The question this paper asks is a question of world economic federalism: at what level of government or community should regulation be lodged, in view of dual objectives of promoting efficiency of regulation for the broader community and serving the values and choices of the local community? In the European Union, the challenge has a name—it is called the problem of subsidiarity. As developed below, the experience of the European Union has much to contribute to the world conversation.

This paper looks in the direction of anchoring liberalization while assuring as much national or local autonomy as possible, consistent with nations "pulling together" to achieve an open, productive, unprivileged world market system.

I. THE PROBLEMS

Because of spill-overs, nationalism, and lack of vision, national law may have a poor fit with transnational problems.[3] There are five particular problems that may call for larger-than-national conceptions: (1) national law cannot catch all the conduct that harms a nation's citizens; (2) national law with a generous reach may regulate other nations' people and transactions and, as a result, intrude on other nations' prerogatives and order; (3) national systems of law and

---

NEW ENG. L. REV. 163, 163 (1999) (noting that the European Union advocates an international antitrust law, which is opposed by the U.S.); *see also*, Joel P. Trachtman, *Introduction: The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996) (defining international economic law); *see generally* Joel R. Paul, *The New Movement in International Economic Law*, 10 AM. U. J. INT'L. L. & POL'Y 607 (1995) (summarizing trends).

[3] *See* THOMAS CHRISTIANSEN, EUROPEAN INTEGRATION BETWEEN POLITICAL SCIENCE AND INTERNATIONAL RELATIONS THEORY: THE END OF SOVEREIGNTY (European University Institute Working Paper RSC No. 94/4, 1994); Joel Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L.J. 459 (1992).

regulation tend to clash; (4) nations often lack vision when problems are larger than their boundaries—we need a broader view from the top; (5) nations are increasingly inadequate representatives of people and firms that, though they reside within their borders, produce, sell, and buy in global markets; as a result, people and firms that reside outside the borders are increasingly regulated without a voice.

The problems are intertwined, as may be seen through the lens of competition law (also called antitrust). In industrialized nations, competition law has largely succeeded in maneuvering around the first problem—the practical limits of national law. With the United States as pioneer in this often controversial enterprise, nations have developed rules of extraterritorial reach of national law. Today, extraterritoriality is largely accepted as a legitimate tool to protect the integrity and security of a nation's commerce and its citizens by reaching offshore acts, such as price-fixing cartels. Extraterritoriality of national law cannot, however, meet the challenge of globalization.[4] First, extraterritoriality is a tool of mature economies that possess sufficient power over outsiders to command obedience. Less developed and developing countries lack the requisite power to reach and discipline offshore actors that harm them. Second, the extraterritorial solution is not complete, as nations can insulate their firms' harmful outbound acts by "acts of state," putting offenders beyond the legal reach of the harmed jurisdiction. Third, the extraterritorial solution creates other problems that arise from the enforcing nation's intrusion into the domain of another nation—it provokes rather than militates against systems clashes.

While the first problem is that national law may catch too little, the second problem is that national law may catch too much. It may extend so far as to regulate what people do on their home territory by means totally inconsistent with their home regulation. Aggressive extraterritorial law may intrude upon another nation's prerogatives. If the latter nation is likewise industrialized, it is likely to fight back, perhaps by trade war or retaliation. If it is less developed, however, it will take what it gets.

---

[4] *See* Eleanor M. Fox, *National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 ANTITRUST L.J. 73 (2000).

As the third problem postulates, in a world of international transactions and extraterritoriality, systems will clash. In the absence of trade wars on the one hand or acceptance of protocols on the other hand, this usually means that the nation with the most prohibitory laws "wins."

Fourth, as a function of their incentives and powers, national officials in a globalized world lack vision. When national or local officials see problems through eyes limited by political borders, their vision is parochial. A producing state wants to take what it can get—to use its market power or to pollute across borders. There is no vision of and for the whole.

Fifth, the nation/state is increasingly a flawed agent for international bargains. There has been a shift in the tectonic plates of business.[5] The activity of firms has shifted from national to global environments. Global firms pierce border barriers with the laser-like speed of e-commerce. Firms look worldwide for inputs, for production sites, and for markets. National agencies, in contrast, look down at their bordered domain. In matters of pre-merger notification and clearance, for example, each national antitrust agency sees its own interest in delaying while vetting international mergers (as well as in collecting filing fees). In matters of trade, trade representatives and legislators respond to domestic businesses' "need" to protect "their" markets from low-priced imports. Ideally, the agent for antitrust should be a citizen of the world in the way that European jurists are citizens of Europe. But typically, national enforcers ask: why should we look at harms beyond our national borders? Why should we count the costs (e.g., costs associated with a U.S. export cartel or a U.S. merger) to the rest of the world?

As a result of this orientation, national enforcers in industrialized countries tend to think of international problems as national, and solutions as horizontal, unilateral or reciprocal. Each nation/community acts in its own interest, usually formulated in the short-term. It may call on a neighbor to help it out—in discovery of evidence, in enforcement of law or in non-enforcement of a neighbor's law that hurts "its" businesses.[6]

---

[5] *See* Trachtman, *supra* note 2.

[6] These solutions are called, respectively, positive comity and negative comity. *See* Claus-Dieter Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833, 836–38 (1994) (defining comity as employed in an

Perhaps the neighbor will return the favor. There is a failure of will and incentive to see the problems as overarching, to search for solutions in the interests of the common good of the greater community, and to appreciate the reality that we are members of the world community.

II. PERFECTING A WORLD TRADING SYSTEM

Solutions must be tailored to problems. This paper presents problem-types exemplified by (1) nation/state regulatory action that imposes costs on outsiders, (2) systems clashes, and (3) failure of vision from the top. Reacting to the particular problems, I suggest avenues for resolution. Each of the avenues suggests unseized opportunities to perfect the world trading system.

A. *Negative Spillovers from State Regulatory Action*

Several situations illustrate the problem of negative spillovers from private conduct that has been blessed by government action and that imposes costs on people who have no voice or recourse. First, I present the problem of the Union Pacific/Southern Pacific merger, approved in the United States and harming Mexico. Second, I present a problem of standard-setting in one community that has the effect of excluding outsiders with incompatible technology.

1. Union Pacific/Southern Pacific

In 1995, the Union Pacific and Southern Pacific Railroads proposed to merge in a deal that would create the nation's largest railroad. The two railroads ran side by side across much of the American West and between the Gulf Coast of Texas and the Mexican border. The merger would create monopolies or duopolies in numerous markets.[7]

In the United States, the Surface Transportation Board (STB) has the right to approve and exempt railroad mergers and

agreement between the U.S. and E.U.); Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Distinction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 526 (1994) (defining notions of comity).

[7] *See* David Young, *Rail Deal Faces Uphill Grade*, CHI. TRIB., Aug. 5, 1995, at C1N (noting that the merger would consolidate control of seventy percent of the truckage in California, ninety-nine percent in Utah, and eighty-nine percent in Nevada).

may do so in the "public interest." The railroads applied to the STB for approval. They argued that the merger would achieve more than $700 million in labor, operational, and other savings, and would enable the merged firm to provide better service. The U.S. Departments of Justice, Agriculture, and Transportation argued to the contrary and estimated that the merger would cost American shippers and consumers $800 million in price raises.

The Surface Transportation Board sided with the railroads and approved the merger subject to modest conditions, exempting it from U.S. antitrust laws.[8]

The potential victims of this decision were clearly Mexican consumers and shippers. Mexican consumers would bear monopoly charges on southbound traffic, while Mexican shippers would bear the cost of monopoly charges on northbound traffic. Mexico was not, however, a concern of the Surface Transportation Board.

The merger was consummated.[9] The result was a deterioration of service and an increase in prices.[10] Mexicans were at the mercy of the new monopolist and had no voice in the process.[11]

2. Geotek/ETSI

In Europe, in the field of wireless communications including electronic paging technology, the members of the industry belong to a group designed to set the technological standards for Europe and seek their adoption by the private European standards body,

---

[8] Union Pacific Corp., et al., Finance Docket No. 32760, Decision No. 44, 1996 WL 467636 (S.T.B. Aug. 12, 1996), *aff'd*, Western Coal Traffic League v. Surface Transp. Bd., 169 F.3d 775 (D.C. Cir. 1999).

[9] *See* Matthew L. Wald, *United States Approves Huge Western Rail Merger*, N.Y. TIMES, July 4, 1996, at D1 (reporting that the railroad merger was consummated with the approval of the Surface Transportation Board).

[10] See John Schmeltzer, Railroad Strives to Vindicate Merger; Doubters Still Stalk Union Pacific Deal, CHI. TRIB., Oct. 1, 2000, at C1 (noting that service deteriorated and prices rose); Allen R. Myerson, Union Pacific Halts Some Traffic to Mexico, N.Y. TIMES, Mar. 26, 1998, at D4 (discussing some of the problems encountered following Union Pacific's acquisition of Southern Pacific).

[11] The head of the Mexican Competition Commission wrote to the Surface Transportation Board noting the harm to Mexico at the crossing. The Board was not concerned about the impact of the merger on foreigners. Of course, Americans were also at the mercy of the monopolist, but they had been heard. *See* Kevin G. Hall, *UP-SP Plan Prompts Concerns in Mexico Antitrust Agency*, J. COM., Aug. 18, 1995, at 1A.

ETSI.[12] Only Europeans may belong to ETSI, and all members agree to use its standards. A number of the Member States of the European Union impose the ETSI standard by law. The European institutions have passed legislation requiring deployment of a mobile telecom services standard by 2002. The ETSI procedures naturally favor European Union incumbents. Moreover, because of network effects[13] and the fact that other jurisdictions such as the United States favor competition among technologies rather than standardization of them, users around the world gravitate to products complying with the ETSI standard.

ETSI endorsed a digital standard for electronic paging equipment. Geotek, an American company that purchased a company from the United Kingdom, was a forerunner in electronic paging using analog technology. It was unable to get a license in Europe to use or convert its technology. The single European standard became the gateway to world competition. Geotek currently operates under bankruptcy protection.[14]

3. Analysis

The railroad and the digital standards cases illustrate an increasingly perplexing problem. Action may be taken by one state that has distinct anticompetitive impacts, and the impacts may fall disproportionately outside of the regulating jurisdiction. Indeed, as Geotek claims in the ETSI matter, the official action may be strategically designed to benefit nationals, (or citizens of a region) or may have the clear effect of doing so. As a result, the benefits may fall disproportionately *within* the regulating state. Moreover, the outsiders have no voice—they lack a right of participation in the making of a decision that will have a major influence on them. Further, the authority that imposes

---

[12] *See* Peter Grindley & Leonard Waverman, *Standard Wars: The Use of Standard Setting as a Means of Facilitating Cartels: Third Generation Wireless Telecommunications Standard Setting (C)*, 3 INT'L J. COMM. L. & POL'Y 2 (1999).

[13] The network is useful and valuable in direct proportion to the (increasing) number of people using the network. Network effects are therefore a barrier to entry. While there is no essential difference between a national standard and a regional standard, a regional standard tends to cover a much larger territory; and as a result, the number of firms required to use the standard will be greater. The open and contestable market will be smaller and the exclusionary effect will be greater.

[14] *See* Grindley & Waverman, *supra* note 12.

the regulation or grants an exemption from competition law not only has the power to stack the deck in its favor, but it has the power to make the political economic choice for the region or the world. Under this scheme, the most prohibitory jurisdiction prevails, while the most open, competitive economy (e.g., the economy with a bias against government-endorsed standards and industrial collaboration to set standards) will lose.

4. Solutions

One solution to virtually all of the global-market problems is regulation at a higher level. This solution, however, has all of the shortcomings of "higher law," including the questions of who will decide what the higher law will be, who will apply it and by what means, how the higher authorities can be held accountable, and how the law can be changed as necessary to meet evolving needs. These are daunting problems and they impel us to seek solutions at a lower level.

There are lessons to be drawn from the modes of regulation and due process safeguards of both the European Union and the United States.

a. Lessons from Europe

The European Union takes a cosmopolitan approach to Member State trade-restraining action in the European internal market. The States, under the Treaty of Rome, may not hinder the free flow of commerce from one Member State to the next, in order to carry out the open-market spirit of the Treaty. Any regulation must be nondiscriminatory and transparent, and obstacles to internal market trade must be tightly justified. In particular, States must not take measures that advantage their citizens over citizens of other Member States.

Within the European Union, the Community often acts by framework directive rather than by uniform substantive rules of law. The framework directive formulates goals and aims of the Community and leaves to the Member States the duty and opportunity to implement the directive through legislation of their choice. Thus, in connection with standards for the transmission of television signals, the European Union adopted an Open Network framework, obliging the Member States' regulatory authorities to provide open architecture and to do so in a transparent and nondiscriminatory way.

The European Union's vision transcends the state. European Union law reprehends and punishes excessive, abusive, and privilege-granting trade-restraining action by Member States. The beneficiary is the citizen of Europe.[15]

b. Lessons from the United States

Lessons from the United States also help to solve the conundrum of anticompetitive regulations that "bind" (i.e., harms) those that have no voice.

The United States has strong principles of due process. Its founding tradition condemns taxation without representation. Case law in the United States highlights the rights of notice, hearing and participation in the event of standard setting, which by its nature may be both exclusionary and efficient. Thus, the Supreme Court stated, in a case in which incumbent industry members excluded new entrants by packing a standard setting meeting with cronies that, "The hope of procompetitive benefits [from private standard-setting] depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition."[16]

The lessons might be extended to fit the international dilemma. Those who will bear the costs of anticompetitive action adopted by a nation/state, but who are outside of the jurisdiction of the state, should have a right to be heard and to participate in hearings. The competition agency of an affected country should be heard. As a result, the Mexican Federal Competition Commission could, in a future *Union Pacific/Southern Pacific* case, have a legal right to participate in proceedings concerning exemption of the merger. In that case, Mexico would have the opportunity to quantify and present to the Surface Transportation Board the costs of the proposed action to Mexico. The United States or Geotek might be accorded a similar right, with due process, to participate in hearings by a European standard setting body that may, as a practical reality, be setting the standard for the world.

But the right of outsiders to be heard and to explain the

---

[15] *See* Eleanor M. Fox, *Vision of Europe: Lessons for the World*, 18 FORDHAM INT'L L.J. 379 (1994).

[16] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509 (1988).

harm to themselves and to their country is a feeble right if the regulating nation's only incentives and obligations are to act in the interests of its own nation. This dilemma leads to lesson three.

c. *A Lesson from Economics and Practical Politics—Counting All the Costs*

We must learn and take seriously the lesson that even the "harming" nation is better off when it stops imposing economic costs on others—whether by public or private restraints. The externality is a distortion of trade that tends to create inefficiencies that radiate throughout the larger community and which tend to produce retaliation and counter-retaliation, creating further inefficiencies. What seems, in the short run, to favor a nation by shifting costs to others, directly decreases the welfare of the larger community and indirectly decreases the welfare of that nation.

The phenomenon of the downward spiral is explained in the following passage from an article, co-authored by this author, which analyzes the problem in the context of private as well as public (e.g., trade) restraints, and which offers as a solution a standard of world welfare (accounting for all costs and benefits in the affected community) instead of the usual standard of national welfare:

> Past the very short run, retaliatory measures and counter-measures taken to offset the first nation's distortion of trade and competition tend to escalate into a downward spiral of increasing impediments to trade. The prospect and reality of the downward spiral have been the impetus to agreements among nations on world trade particularly in the context of the GATT/World Trade Organization. The message that such nationalistic games are harmful was first brought home to nations with regard to government-imposed quotas, tariffs, voluntary export restraints, and similar impediments. It has only recently been recognized with respect to government-imposed non-tariff barriers, including foreign investment limitations, unreasonably exclusionary standards (e.g., in telecommunications) and discriminatory procurement policies.
>
> The lesson has not yet been brought home, however, with respect to private restraints, and (perhaps peculiarly, because it *is* government action) facilitation by governments of restraints by firms within their territory. Yet governments

> quite perceptibly and pervasively facilitate private restraints, and the costs to the world possibly amount to billions of dollars a year in lost income. Governments may act in numerous anticompetitive ways. National legislatures may limit the coverage of antitrust laws so as not to reach beggar-thy-neighbour restraints. Executive or administrative decisions may be taken not to enforce antitrust law where the gain from harm to foreigners is judged greater than the loss to the nations' own constituency.
>
> An alternative to the national welfare standard is a world welfare standard. "World welfare" is used here to mean the aggregate level of consumer benefits and profits realized by consumers and firms in all pertinent countries. The case for a world-welfare standard to guide the two residual areas identified above—private restraints of international dimension, and government facilitation of them—seems rather compelling....[17]

The above point is made solely in economic terms. The same phenomenon—disregarding the costs that fall on "foreigners"—has an important moral and social policy dimension as well. Where a nation regulates business structure or conduct that harms outsiders but makes its regulatory decisions without taking account of harm to outsiders, and the nation stands behind the decision as one entitled to the respect of the world, the decision lacks legitimacy. Thus, the principle of counting all costs has an economic, moral, and political policy dimension.

To avoid this problem of narrow or biased nationalism, world leaders might adopt the following principle to guide their economic dialogue: when a nation considers regulatory action that may have unwelcome impacts beyond its borders, it should provide rights of process to persons beyond its borders, and it should count the costs and benefits beyond its borders as if all affected areas lay within its borders.[18] Only then, especially if

---

[17] *See* Eleanor M Fox & Janusz Ordover, *The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 WORLD COMPETITION L. & ECON. REV. 15–16 (1995); Wolfgang H. Reinicke, *Global Public Policy*, 76 FOREIGN AFF. 131 (1997).

[18] Some ask: How can we possibly consider antitrust harm beyond our borders? First, in cases of world markets, this consideration is a necessary part of the analysis that regulating authorities must undertake. For example, in the merger case of *Boeing*, if it was price-raising, it would affect the world. Data on the buyers' market would indicate the extent of harm to customers located abroad. Second, a burden can be put on harmed outsiders to come forward with proof of harm to them.

the outside jurisdictions and people lack the power to protect themselves, will the regulatory action be efficient and legitimate.

National law does not reach so far today and statutory change would be needed. The more national enforcers and regulators resist taking account of the costs "to foreigners," however, the sooner the day will come for international regulation. Unnecessary international regulation could place the businesses of the world in straight jackets.

B. Systems Clashes

Nations' different and sometimes conflicting laws often apply cumulatively to the same transaction. Outcomes can be different because local market conditions are different. There are occasions, however, where there is only one market and that market is the world.

Such was the situation when Boeing, the world's largest producer of commercial jet aircraft, sought to acquire McDonnell Douglas, the third largest. McDonnell Douglas had failed to invest in new generation technology and had a dim future. The only other competitor in the world was Airbus Industrie, the European consortium. In connection with the acquisition, Boeing entered into exclusive supply agreements with the three large airlines from the United States, tying up some twelve percent of the world market for twenty years.

The United States Federal Trade Commission vetted the merger, found no competitive problem because of McDonnell Douglas' probable inability to compete for next generation sales, and closed the investigation. The European Union also vetted the merger but stressed that Boeing would increase its share of the world market from sixty-four percent to seventy percent. It found serious competitive problems with the merger of the two firms (both United States firms with no assets in Europe), on the theory that Boeing would substantially increase its dominance. The European Union would have prohibited the merger had Boeing not agreed to conditions that included dropping the exclusive contracts and licensing technology that had been subsidized by the United States government. The settlement came only after top-level threats of a trade war and accusations of nationalistic strategies on both sides.[19]

---

[19] *See* Eleanor M. Fox, *Antitrust Regulation Across National Borders: The*

Boeing is the tip of the iceberg. Many other conflicts have arisen and will probably arise. Others that have occurred thus far have usually been less public or less hotly contested than *Boeing*. When Europe's commuter-plane manufacturing consortium sought to acquire its biggest competitor, Canada's de Havilland, Canada permitted and supported the merger but Europe prohibited it. When two platinum mining firms sought to merge in South Africa, South Africa permitted and supported the merger but Europe prohibited it.[20] When two Swiss pharmaceutical companies planned to merge, Europe cleared the merger with no conditions, but the United States required the spin-off of a line of research activity.[21]

United States authorities normally approve a merger if it cannot be proven to raise prices. The European Commission normally disapproves a merger or imposes regulatory conditions if the merger significantly enhances the market share of a dominant firm, creates joint dominance, or seriously distorts the playing field for competitors. Further still, other countries' laws have different nuances. Most outcomes are the same, but there is a significant margin of difference. Mergers affect the basic structure of industry, and the structure of industry within a nation has historically been a subject of national industrial policy. Unarticulated national biases may subtly and invisibly tip the scales in arguable cases. What is to be done?

C. Solutions

Possible solutions include a single set of laws for international transactions in global markets. This would be difficult to accomplish, however, and it would be harder yet to assure administration of the law with fairness and legitimacy.

At the other extreme, nations could insist on the right of unilateral enforcement as they deem fit in the interests of their nation, perhaps with bilateral duties of notification,

---

United States of Boeing versus the European Union of Airbus, 16 BROOKINGS REV. 30 (1998); *Boeing Attempting to Sell de Havilland*, AVIATION DAILY, July 23, 1990, at 137.

[20] *See* Case T-102/96 Gencor Ltd. v. E.C. Comm'n, 5 C.M.L.R. 971, 1019 (Ct. of First Instance 1999).

[21] *See* Ciba-Giegy Ltd., Dkt. C-3725 (consent order Mar. 24, 1997), summarized at 5 Trade Reg. Rep. (CCH) ¶ 24, 182; Eleanor M. Fox, *Extraterritoriality and the Merger Law: Can All Nations Rule the World?*, ANTITRUST REP. 2 (Matthew Bender, 1999).

consultation, and explanation, as is now the case between the United States and the European Union and various other jurisdictions.

The national-interest model is likely not to be sufficient in this millennium when one nation's merger affects the world. If nations decide to work towards cosmopolitan principles, a beginning set of principles for mergers of international dimension might look like this:

(1) Nations' laws and the underlying mode of analysis should be transparent;

(2) Nations should apply their laws without discrimination based on nationality;

(3) Nations should not allow national champion interests to trump competition interests—they should neither enforce nor withhold enforcement in the interests of a national champion;

(4) If nations apply non-competition objectives such as national security or environmental concerns, they should do so transparently and by means tailored to achieve their ends;

(5) If a nation's law expressly allows a non-competition trump, the trumping value or factor should be separately applied after the competition analysis has been completed.[22]

Even this set of principles may not be enough, however. What happens when, in spite of the five principles, systems clash? If there is an interest in countering the state of affairs in which the nation with the most prohibitory law always prevails, we may need either higher law or rules of priority. Assuming that the latter is preferable if workable, we should consider rules of priority. For example, the right to grant or not grant drastic relief (an injunction or break-up) might be assigned to any nation[23] that is "home" to both merging firms and is one of the largest markets for the product or service. But if any nations have rights of priority, there will be no legitimacy unless: (1) the nation with the right of priority counts all costs wherever in the world they fall, and treats all costs and benefits as if they fell within that jurisdiction; and (2) harmed persons or nations outside of the regulating jurisdiction have rights of due process

[22] *See* International Competition Policy Advisory Committee (ICPAC) Final Report (2000), *available at* http:// www.usdoj.gov/atr/icpac/chapter5.htm.

[23] I use "nation" to include a larger juridical community; thus, the European Union.

before the court or agencies within the regulating jurisdiction.[24]

This proposal is an adaptation to private restraints of the principles suggested above that harness state restraints.

D. The Lack of Vision From the Top

Lack of vision from the top is a startling missing element in a world in which national law governs global transactions. The blinkered vision problem reasserts itself repeatedly.

One set of problems is exemplified by the state of merger control and pre-merger clearance in the world. This is a problem of excessive uncoordinated regulation. More than sixty nations now have merger control laws, and more than forty have laws that require pre-merger notification (usually cumbersome and expensive), and a period of waiting before clearance, which may take five to eight months or more. The threshold for reporting and waiting are often very low. A small stream of sales into the nation may trigger application of the nation's law; the merging firms may have no assets in the jurisdiction. A small country like Bulgaria or Romania can hold up and possibly abort a multinational merger, even when the market in that nation is small and the merging firms together have an insignificant market share therein. A single multinational merger may be required to pass through twenty or thirty national merger systems before consummation. Even if the market is global, there is no different impact in any nation, and the merger is being seriously vetted by two or more mature agencies in the nations that account for the major purchases.[25]

Despite the large and many nets cast to vet international mergers, few mergers are challenged because few present competition concerns. In the United States, approximately two percent of notified mergers become the subject of enforcement actions. In Canada the percentage is one and a half percent.

If one were to design an effective merger control system for the world, it would not resemble the ad hoc, uncoordinated,

---

[24] *See supra* note 22, at http:// www.usdoj.gov/atr/icpac/chapter2.htm.

[25] *See supra* note 22, at http:// www.usdoj.gov/atr/icpac/1a.htm; Douglas Ginsburg & Scott Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 ANTITRUST L.J. 219 (2000); J.W. Rowley & A.N. Campbell, *Multi-Jurisdictional Merger Review—Is it Time for a Common Form Filing Treaty?*, *in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW, A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY (Global Competition Rev., 1999); *see generally supra* note 22, at http://www.usdoj.gov/atr/icpac/chapter3.htm.

reinvent-the-wheel merger control regimes of today. In addition, with a view from the top we would not and could not ignore the less developed world. Demographics and demographic trends, economics, and justice values, require us to move forward on a premise of inclusiveness. Bringing the less developed and developing countries into the core of the world trading system would enhance both world economic welfare and justice. Thomas Friedman has written eloquently about the role of global pressures in squeezing out cronyism and helping to put economies on a base of merit, not privilege.[26] Others have observed how cartels ostensibly targeted at the third world (and thus never challenged) are in fact world cartels that hurt us all.[27] The ripple effects of monopolistic practices that harm nations that lack the institutions or the will to fight back are likely to become large waves on the global ocean. We are, economically (like it or not), one world.

Furthermore, the world trading system is distorted by problems of private restraints that re-close opened markets and undermine the system. Liberal trade law attends to public restraints. Competition law is left to deal with private restraints. But competition law is national. National law is not up to the task of opening foreign markets and countering distant restraints; indeed, national law may not apply. To make the world trading system more complete, and to inform the several sectoral instruments of the World Trade Organization that already contain competition obligations, we may need to deepen the WTO's competition competences.

Solutions to the vision-deficit problem are elusive. Networking of nations on a horizontal plane is important but may not be enough. We should work multilaterally towards certain attainable solutions, even while developing deeper, thicker networks of cooperation. For example:

---

[26] *See* THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE, GLOBALUTION, ch. 8 (1999).

[27] *See* FRÉDÉRIC JENNY, GLOBALIZATION, COMPETITION AND TRADE POLICY: CONVERGENCE, DIVERGENCE AND COOPERATION (Competition Policy in the Global Trading System, Conference Paper, Washington, D.C., June 23, 2000); KEITH N. HYLTON & MICHAEL SALINGER, TYING LAW AND POLICY: A DECISION THEORETIC APPROACH (B.U. School of Law, Working Paper Series, Law and Economics, Working Paper No. 01–04, 2001).

1. Merger Control—Pre-Merger Notification.

Nations should establish a common clearing house or a system of mutual recognition of merger filings, available on an opt-in basis to merging parties. Either a clearinghouse center could be established to receive and disperse filings to jurisdictions that file a claim-of-right to receive the notification, or the jurisdiction of the first filing could have a duty to disperse the filings to all possibly interested nations. Recipient countries would be required to accept the filing in the first instance, with a right to receive codicils for particular, separate markets within their jurisdiction.[28]

Nations would be invited to agree not to assert entitlement to notification unless either the parties have substantial assets in the jurisdiction or there is a credible claim of harm to competition in the jurisdiction. Nations vetting the same merger could be required to coordinate their investigations and analysis.

2. Developing Countries

First, bilateral cooperation agreements should be multilateralized, to give developing countries protections and opportunities that they themselves would be unable to procure bilaterally. Second, nations should extend their laws to cover outbound cartels; for, of all antitrust restraints, cartel agreements are the most clearly wrong and harmful, and developing countries are usually ill equipped to successfully challenge offshore cartels that harm them. Third, nations should ratchet back their anti-dumping laws, as a first stage they could be required to give equal weight to their own buyer's interests. These laws have particularly harmful effects on developing countries, whose low-priced exports are blocked from sales on the merits. Fourth, developed countries should provide coordinated technical assistance to developing countries, with special sensitivity to the context and needs of the recipient

[28] The merging parties might be obliged to provide a skeleton summary of the planned merger and a list of all possibly interested nations. These nations would receive the skeleton notice, and would either be obliged to come forward, prove their entitlement to notification, and give mutual recognition to the filing, or would waive their right to participate in pre-merger clearance.

A similar proposal has been made by Judge Diane Wood. *See* Diane Wood, *International Competition Policy-Convergence / Cooperation?* (Cutting Edge Antitrust Seminar, Feb.18, 2000).

country, exploring how competition policy can help the particular country and advising how competition law can be implemented to its advantage. Most importantly, developing countries should have voice and be accorded respect in the exploration of multilateral initiatives.

3. Requiring Open Markets

Within the WTO, nations should be obliged not to close their markets, or condone the closing of their markets, by artificial private restraints as well as public restraints. For private restraints, the law (e.g., competition law) of the excluding nation should apply, as should principles of transparency, nondiscrimination, due process, and access to courts.[29] Aspects of each of these proposals meet resistance in the name of sovereignty. This resistance will not, I predict, withstand time.

CONCLUSION

In matters of economics and market conduct, we are on a trend line toward "one world." We can close our eyes and insist on narrow national solutions, or we can be architects of a more nearly open, integrated world.

This paper is an attempt to stimulate dialogue on liberal solutions to the problem of incoherence between national law and global commerce. It suggests open architecture and the embrace of principles of cosmopolitanism that would link the nations and people of the world while giving weighty respect to subsidiarity.

---

[29] *See* Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665 (1999); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AMER. J. INT'L L. 1 (1997).